91-1174 (1)

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARY LYNN MEYERS; DONALD F. MEYERS, Executor of the Estate of Geraldine E. Meyers,

Petitioners,

v.

BETTE, a/k/a BETTY KALLESTEAD d/b/a BETTE MOM'S TAVERN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

A. John Frey, Jr.
JURGEMEYER, FREY & HAUFE
601 South Third Street
Clinton, Iowa 52732
Telephone: (319) 242-1832

ATTORNEY OF RECORD
FOR PETITIONERS

QUESTION PRESENTED FOR REVIEW

Whether the United States Constitution immunizes a state line vendor of alcoholic beverages from suit in an adjacent state for damages caused by the vendor's drunken patrons in the adjacent state?

TABLE OF CONTENTS

	Page
Table of Authorities.....	iv
Reports of Opinions by Other Courts	2
Jurisdictional Statement.....	2
Constitutional Provision.....	2
Statement of the Case.....	4
Argument.....	8
Appendix.....	16
A. Opinion of Iowa District Court for Clinton County.....	16
B. Opinion of Iowa Supreme Court..	18
C. Petition at Law.....	32
D. Motion to Dismiss for Lack of Jurisdiction Over the Person and Failure to State a Claim in Which Any Relief Can be Granted.....	51
E. Resistance.....	57
F. Memorandum in Support of Plaintiff's Resistance.....	62

G. Motion to Dismiss-United States District Court Northern District of Illinois..... 83

TABLE OF AUTHORITIES

Cases — Page

BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752 (Minn. Ct. App.; Certiorari denied, 474 U.S.844 (1985) 9

Linaberry v. DePaw., 695 F. Supp. 411 (C.D.Ill. 1988) 5

Meyers v. Kallestead, 476 N.W.2d 65 (Iowa 1991) 2

Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959) 10

West American Insurance Co. v. Westin, Inc., 337 N.W.2d 676..... 8,9

World-Wide Volkswagen Corp. v. Woodson., 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 8,9,11, 490 (1980) 12,14,15

Statutes/Rules

Constitution of the United States, Amend. 14, Sec. 1 2

28 U.S.C. Sections 1257(a); 2101(c); 2104 2

43 Ill. Rev. Stat., Sec. 135 5,11

Supreme Court Rule 10.1(c) 15

Other

Page

Lewis, Sale of Alcohol to Interstate Travelers: Personal Jurisdiction and Choice of Law Analysis, 39 Drake L. Rev. 349 (1989-90) 9

Purdy, None for the Road., Current Health, Vol. 17, No. 2, p. 15, Oct. 1990 (citing National Highway Traffic Safety Association. 14

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARY LYNN MEYERS; DONALD F. MEYERS, Executor of the Estate of Geraldine E. Meyers,

Petitioners,

v.

BETTE, a/k/a BETTY KALLESTEAD d/b/a BETTE MOM'S TAVERN,

Respondent.

Petitioners pray for issuance of a writ of certiorari to the Iowa Supreme Court to review a judgment against Petitioners, injured Iowa residents, and in favor of Respondent, an Illinois tavern owner.

OPINIONS BELOW

The opinion of the Trial Court appears in full at Appendix A, pages App. 16-17. The opinion of the Iowa Supreme Court appears at Appendix B, pages App. 18-32. It is published as Meyers v. Kallestead, 476 N.W.2d 65 (Iowa 1991).

JURISDICTION

The Iowa Supreme Court opinion was entered October 16, 1991. (App. 18) Jurisdiction to review is conferred upon this court by 28 U.S.C. Sections 1257(a); 2101(c); 2104.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent Bette Kallestead operates a tavern in Savanna, Illinois. On December 16, 1989 James Walton Hall, an intoxicated patron of Kallstead's tavern, drove his automobile across the Mississippi River bridge from Savanna into Iowa and shortly thereafter collided with an automobile occupied by Mary Lynn Meyers and Geraldine E. Meyers. (App. 32-50) The collision, which occurred in the city of Clinton, Iowa, caused the death of Geraldine Meyers and seriously injured Mary Lynn Meyers. (App. 32-50)

Petitioners filed suit in Clinton County District Court against Kallestead alleging both statutory dram shop and common law causes of action. (App. 32-50) Neither the Illinois dram shop statute nor Illinois common law provide a remedy for victims of drunk drivers who are injured outside the state of Illinois, even though

the driver became intoxicated from beverages sold and served in Illinois.[1]

On April 10, 1990 Respondent filed a Motion to Dismiss Petitioner's suit for lack of jurisdiction over the person and failure to state a claim upon which any relief could be granted. Respondent objected to jurisdiction over her person on federal constitutional grounds of insufficient contacts with Iowa. (App. 51-54)

In support of her motion Respondent filed an affidavit stating she owns and operates a tavern in Savanna, Illinois which is licensed by both the city of Savanna and the state of Illinois. She does not hold an Iowa liquor license nor does she advertise in any Iowa newspaper

---

[1]The Illinois Dram Shop Statute does not apply to injuries occurring outside Illinois borders, nor does Illinois recognize a common law cause of action based upon sale of intoxicating liquors. 43 Ill. Rev. Stat. Sec. 135 (App. 73-82) Linnabery v. DePaw, 695 F. Supp. 411, (C.D. Ill. 1988).

or other media or in any media circulated or broadcast in the state of Iowa. She does not own or operate any business in the state of Iowa. (App. 54-56) Savanna, Illinois is located on the east bank of the Mississippi River which constitutes the border between Iowa and Illinois. It is connected to Iowa by a bridge crossing the Mississippi River at Savanna. (App. 64)

By order signed July 31, 1990 the trial court sustained Respondent's motion on the basis she lacked sufficient minimum contact with the state of Iowa to support personal jurisdiction over her. (App. 16)

On Petitioner's appeal to the Iowa Supreme Court the trial court's dismissal was affirmed by ruling filed October 16, 1991. (App. 18-31) The Iowa Supreme Court held the "due process" clause of Amendment 14, U.S. Constitution, compelled denial of personal jurisdiction over

border state liquor vendors under the rationale of this Court's decision in World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), absent a showing Respondent has "purposefully availed herself of the privilege of conducting activities within this state". (App. 30)

ARGUMENT

Petitioners seek to be heard in this case upon a simple issue of great social significance. At stake is a state's right to protect its citizens and their property from damage caused by sale of alcoholic beverages by border state liquor vendors. The highest courts of two states, first Minnesota and now Iowa, have felt compelled to deny jurisdiction over border state liquor vendors based on this Court's ruling in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). In fact, the Minnesota Supreme Court felt compelled after the World-Wide Volkswagen decision to expressly overrule a case decided two years prior to the World-Wide Volkswagen decision and deny personal jurisdiction over a Wisconsin tavern because there was no evidence the tavern advertised in Minnesota or did a substantial volume of business with Minnesota residents. West Amer-

ican Insurance Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983).

A later Minnesota decision involving the same tavern and very similar facts sustained personal jurisdiction because at the time of the second injury the tavern had done some advertising on Minnesota radio stations. BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752 (Minn. Ct.App.; certiorari denied, 474 U.S.844 (1985).

Petitioners contend this Court's decisions in World-Wide Volkswagen and subsequent cases does not compel the results reached by the Iowa and Minnesota courts on federal constitutional grounds.[2] These state courts have, unduly focused upon the "purposeful acts" language of the World-Wide Volkswagen decision, taken out

---

[2]The Minnesota decision in West American Insurance Co. v. Westin, Inc. was critically reviewed recently; Lewis, Sale of Alcohol to Interstate Travelers: Personal Jurisdiction and Choice of Law Analyses, 39 Drake L. Rev. 349 (1989-90)

of context, and now feel compelled to deny personal jurisdiction over border state taverns even though such vendors of alcoholic beverages create significant injuries and social problems in the forum state.

Since the Iowa courts have declined to exercise personal jurisdiction over the Respondent on federal constitutional grounds, the Petitioner's only hope, absent a reversal of the Iowa court decision, is to convince an Illinois court to apply Iowa law in an action filed in Illinois.[3] More importantly, if the state courts are correct, the legislatures in both Iowa and Minnesota are prevented from passing legislation which will allow suits

---

[3]Petitioners have filed a protective action in the U.S. District Court for the Northern District of Illinois, Case #91 C20362, on the strength of Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959). Respondent has filed a motion to dismiss claiming Iowa law does not apply, which motion is presently pending. (App. 83)

in their respective states against border state vendors whose patrons cause injury in Minnesota or Iowa unless the vendors advertise in the forum state or the victims can prove they do business with residents of the forum state. Furthermore, the Iowa and Minnesota holdings call into question the constitutionality of that portion of the Illinois dram shop statute which allows suit in Illinois against out-of-state liquor vendors whose patrons cause damage in Illinois.[4]

In the World-Wide Volkswagen decision this Court notes the purpose of the minimum contacts rule is to protect defendants from the burdens of litigating in a distant or inconvenient forum and to insure states do not reach out beyond proper limits as established by their status as co-equal sovereigns in an equal system,

---

[4]The Illinois dramshop statute applies to any person licensed in Illinois or "any other state to sell alcoholic liquor" 43 Ill. Rev. Stat. Sec. 135.

(App. 73-82)

World-Wide Volkswagen Corp. v. Woodson, supra at 444 U.S. 292, 100 Sup. Ct. 564. The state courts in applying the World-Wide Volkswagen rationale to limit personal jurisdiction over border state taverns overlooked two very important factors. First, the purposeful act of locating a tavern business in a town along the state's border with an adjoining state will, by that very fact alone create a reasonable expectation the business owner will be haled into court in the adjacent state when drunken patrons cause damage there. Second, the purposeful act of creating or contributing to a person's intoxication, is sufficient to subject the tavern owner to the jurisdiction of those courts in neighboring states where the intoxicated person is likely to cause damage during the time period immediately following the sale when that patron will remain in an intoxicated condition.

This is not a case where a defective product launched into the stream of commerce could surface and cause an injury thousands of miles away and months, or even years later. As such, dram shop cases present a somewhat unique set of circumstances. An injury, if it occurs, and if it is causally connected to the tavern owner's activitites, is likely to occur within a matter of hours after the sale and in an area the intoxicated patron can reach during that period of time. In such a case it appears tavern owners should expect their actions contributing to the intoxication should reasonably subject them to being hailed into court in any neighboring state where the patron causes damage.

SUMMARY

In today's world where alcohol is a factor in approximately 50% of fatal motor vehicle accidents (nearly 25,000 deaths

per year) and plays a role in over 500,000 motor vehicle related injuries per year in our country[5], it is important to permit state courts and legislatures to deal with the problem caused in their state by taverns selling alcoholic beverages in adjoining states where the laws of the adjoining state provides little or no remedy to injured victims. If the rulings of the Iowa and Minnesota courts stand, a victim's remedy may very well depend upon the truthfulness of a defendant tavern owner in responding to questions about the nature and extent of its contacts with the neighboring state in which damage has occurred. Common sense, equity, and efficient use of judicial resources militate against the decisions these two state courts felt compelled to reach based on their reading of the World-Wide Volkswagen

---

[5]Purdy, None for the Road, Current Health, Vol. 17 No. 2, p. 15, Oct. 1990 (citing National Highway Traffic Safety Association).

decision. The decision sought to be reviewed has decided an extremely important question of federal law which should be settled by this court. The decision below broadens the scope of this court's decision in World-Wide Volkswagen well beyond its holding and substantially impairs the rights of injured victims to seek compensation from vendors of alcoholic beverages. It should be reviewed under Supreme Court Rule 10.1(c).

Dated January 8, 1992.

Respectfully submitted,

A. John Frey, Jr.
601 South 3rd Street
Clinton, IA 52732
(319) 242-1832

APPENDIX A

On July 31, 1990, the following was filed:

IN THE IOWA DISTRICT COURT FOR
CLINTON COUNTY

CASE NO. CL13758

MARY LYNN MEYERS; DONALD F. MEYERS; Executor of Estate of Geraldine E. Meyers,

Plaintiffs,

vs.

JAMES WALTON HALL, ROBERT D. HALL, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN,

Defendants.

ORDER GRANTING DEFENDANT BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERM MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

Now on May 3, 1990 pursuant to order there comes before the Court the Motion to dismiss for lack of Jurisdiction over the person granted filed by defendant Betty Kallestead, d/b/a BETTE MOM'S TAVERN, which motion was filed on April 10, 1990.

Plaintiff's counsel is A. John Frey,

Jr. Counsel for Defendant Betty Kallestead, d/b/a BETTE MOM'S TAVERN, is Frank R. Fuhr.

The motion to dismiss was filed in two divisions. Counsel withdrew the second division.

I find that said defendant lacks the minimum contacts with the State of Iowa as provided for in Iowa Rule of 56.2 to subject her to the jurisdiction of this court.

IT IS ORDERED BY THE COURT that said motion to dismiss is granted and Divisions III, IV, V and VI of plaintiffs' petition are dismissed.

The Clerk shall give notice of this order pursuant to Rule of Civil Procedure 82.

Signed: July 31, 1990.

(Duly signed)

* * * * * *

APPENDIX B

IN THE SUPREME COURT OF IOWA

No.326 / 90-1310

Filed October 16,1991

IN RE:
MARY LYNN MEYERS; DONALD F. MEYERS, Executor of the Estate of Geraldine E. Meyers,

Plaintiffs-Appellants,

v.

BETTY KALLESTEAD d/b/a BETTE MOM'S TAVERN,

Defendant-Appellee.

Appeal from the Iowa District Court for Clinton County, L.D. Carstensen, Judge.

Appeal from dismissal of nonresident defendant for lack of minimum contact. AFFIRMED.

A. John Frey, Jr. of Jurgemeyer, Frey & Haufe, Clinton, for appellants.

Frank R. Fuhr of Klockau, McCarthy,

Ellison & Marquis, P.C., Rock Island, Illinois, for appellee.

Considered by McGiverin, C.J., and Larson, Neuman, Snell, and Andreasen, JJ.

ANDREASEN, J.

The issue in this dram shop tort action is whether the nonresident tavern owner has sufficient minimum contacts with Iowa to confer personal jurisdiction. The nonresident owner challenged the court's jurisdiction. The nonresident owner challenged the court's jurisdiction by filing a motion to dismiss. Iowa R. Civ. P. 104(a). The district court found the owner lacked minimum contacts with Iowa as required by Iowa Rule of Civil Procedure 56.2 and granted the owner's motion to dismiss. We affirm.

I. Scope of Review. When reviewing a motion to dismiss for lack of personal jurisdiction over a defendant, our well established standard of review is:

[W]e accept as true the allegations

of the petition and the contents of uncontroverted affidavits. The plaintiff has the burden to sustain the requisite jurisdiction, but when he [or she] establishes a prima facie case the defendant has the burden of producing evidence to rebut that showing. The trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence in the record; we are not bound, however, by the trial court's application of legal principles or its conclusions of law.

Percival v. Bankers Trust Co., 450 N.W.2d 860, 861 (Iowa 1990).

When resolving jurisdictional questions regarding nonresidents, the allegations of the petition which go to the merits of the claim are taken as true; other allegations in the petition may be contradicted by affidavits, testimony, and other evidence. Martin v. Ju-Li Corp., 332 N.W.2d 871, 873 (Iowa 1983). The minimum contacts test is not susceptible of mechanical application; each case must be weighed to determine whether affiliating circumstances are present. Lansky v. Lansky, 449 N.W.2d 367, 369 (Iowa 1989).

II. Background. The plaintiffs' petition alleges Betty Kallestead owns and operates a business in Savanna, Illinois, known as Bette Mom's Tavern. Alcoholic beverages are sold there. On December 16, 1989, Kallestead or her agents or employees, sold and served James Hall alcoholic beverages when he was intoxicated or when Kallestead or her agents or employees should have known he would become intoxicated. The sale and service of alcoholic beverages to Hall was a proximate cause of his intoxication. While in an intoxicated condition, Hall drove his truck into an automobile driven by Mary Lynn Meyers on U.S. Highway 67 in Clinton County, Iowa, causing injury to her and the death of Geraldine E. Meyers. The petition alleges both dram shop and common law claims again the tavern owner.[1]

---

[1]The petition originally alleged a cause of action against Hall. This action was severed and later dismissed.

Kallestead filed a motion to dismiss for lack of jurisdiction over the person. The motion was supported by her affidavit stating she is a Savanna, Illinois, resident; she is the owner and operator of a business known as Betty Mom's in Savanna; and she holds a liquor license issued by Savanna and the State of Illinois. Her affidavit further states that she does not advertise in any Iowa newspaper or other media, and does not advertise in any media whatsoever that is circulated or broadcast in the state of Iowa; and that she does not own or operate any business in the state of Iowa nor does she possess an Iowa liquor license.

Meyers filed a memorandum in resistance to the motion. In the memorandum Meyers suggests the court take judicial notice that Savanna is connected to Iowa by a bridge crossing the Mississippi River and argues Kallestead should anticipate

that patrons of her tavern might travel into Iowa.

Based upon a finding that she lacks the minimum contacts with the state of Iowa to subject her to the jurisdiction of the Iowa court, the district court granted Kallestead's motion. Meyers appealed.

III. Personal Jurisdiction. The Due Process Clause provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, Sec. 1. The due process clause operates to limit the power of a state to assert personal jurisdiction over a nonresident defendant. Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Whether Iowa may exercise jurisdiction consistent with due process depends on whether the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion of fair play

and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316-17, S. Ct. 154, 158-59, 90 L. Ed. 95, 102-03 (1945). In determining whether the suit passes due process requirements, the critical focus is on the relationship among the defendant, the forum and the litigation. Rush v. Savchuk, 444 U.S. 320, 327, 100 S. Ct. 571, 576, 62 L. Ed. 2d 516, _____ (1980). This relationship is defined by the defendant's contacts with the forum state, not with its residents. Hanson v. Denckla, 357 U.S. 235, 250-55, 78 S. Ct. 1228, 1237-40, 2 L. Ed. 2d 1285, _____ (1958). Jurisdiction of the person lies where the defendant has purposely directed its activities at residents of the forum state, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790, 797-98 (1984), and litigation results from alleged injuries that arise out of or are

related to those activities. Helicopteros, 466 U.S. at 414, 104 S. Ct. at 1872, 80 L. Ed. 2d at 411. See also State v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371, 375-77 (Iowa) cert. denied, _____ U.S. _____, 111 S. Ct. 556 (1990).

When determining whether sufficient contacts exist to support the exercise of jurisdiction over a nonresident defendant, our court has looked at the following factors, concentrating on the first three: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience of the parties. Larsen v. Scholl, 296 N.W.2d 785, 788 (Iowa 1980). Rule 56.1 expands Iowa's jurisdictional reach to the widest due process parameters of the federal constitution. Id.

Under these broad parameters, we held

in personam jurisdiction existed over a nonresident defendant whose only contact with Iowa was a long distance telephone call to the plaintiff in Iowa. Norton v. Local Loan, 251 N.W.2d 520, 521 (Iowa 1977). This holding was based upon the reasoning of Edmundson v. Miller Trailer Co., 211 N.W.2d 269 (Iowa 1973). In Edmundson we recognized a national tendency which generally required less and less contact to satisfy the minimum contacts for due process. Id. at 272. We stated it was reasonable to assume that the nonresident defendants, the manufacturer and retailer of the trailer and hitch, would be subject to a lawsuit anywhere the trailer and hitch would travel. Id. Later we overturned the Edmundson holding because it was at odds with World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed 2d 490 (1980). See Smalley v. Dewberry, 379 N.W.2d 922, 924-25 (Iowa

1986).

Like our decision in Smalley, the Minnesota Supreme Court has recognized that World-Wide changed due process analysis of personal jurisdiction. This is reflected in the context of personal jurisdiction over border state liquor vendors. Prior to World-Wide, the Minnesota Supreme Court found its court had personal jurisdiction over the operator of a tavern located three miles south of the Iowa-Minnesota border who illegally sold liquor to Minnesota residents who subsequently became involved in a Minnesota accident. Anderson v. Luitgens, 311 Minn. 205, 247 N.W.2d 913 (1976). The court noted it was reasonable for the tavern owner to foresee that making illegal sales might lead to consequences such as those which resulted. The Minnesota court also upheld personal jurisdiction over a Wisconsin border state liquor vendor under similar circumstances. See Blamey v.

Brown, 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980). In both of these cases the court found the minimum contacts requirement had been satisfied. The court's rationale recognized Minnesota had a strong interest in providing a forum, that Minnesota was a convenient forum, and that the consequences of the sale of liquor, i.e., an accident in Minnesota, was foreseeable.

Later, the Minnesota Supreme Court overruled these cases. In West American Insurance Co. v. Westin, Inc., 337 N.W.2d 676, 678-79 (Minn. 1983), the court recognized it had previously addressed the issue of personal jurisdiction over border state liquor vendors. The court stated:

> In World-Wide and Rush, the United States Supreme Court attempted to slow the inexorable expansion of jurisdiction in state courts by underlining the significance of territoriality and de-emphasizing the relative importance of "fairness" to the defendant. . . . These cases evidence a dramatic shift in the constitutional theoretical underpinnings of personal jurisdiction. After World-Wide and Rush,

the critical focus in any jurisdictional analysis must be on "the relationship among the defendant, the forum and the litigation." . . . This tripartite relationship is defined by the defendant's contacts with the forum state, not by defendant's contacts with residents of the forum. (Citations omitted.)

337 N.W.2d at 678-79. The court further stated:

Ordinarily, we should hesitate to overturn our own precedential decisions, but where, as here, our precedent is patently contrary to constitutional principles authoritatively declared by the United States Supreme Court, we have no proper alternative.

Id. at 681.[2]

Under the rational of World-Wide, we focus our attention on Kallestead's contacts with Iowa. We find the record fails to establish that she has the required minimum contacts with our state. There is no indication that she has purposefully

[2]The Minnesota courts have subsequently asserted personal jurisdiction over border state liquor vendors. In these cases, sufficient facts were established showing that the nonresident defendant purposefully established minimum contacts. See Lawson v. Darrington, 416 N.W.2d 841 (Minn. Ct. App. 1987); BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752 (Minn. Ct. App.) pet. for rev. denied without op. (Minn.) cert. denied, 474 U.S. 844 (1985).

availed herself of the privilege of conducting activities within this state. Her only contact with Iowa is through Hall who drove into Iowa after leaving her tavern.

IV. Disposition. We conclude the trial court correctly determined Kallestead had not purposefully established minimum contacts in Iowa. Although Meyers argues Kallestead should have foreseen her conduct would cause injury in another state, the Supreme Court has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528, 542 (1985). "The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." Id.

We affirm the district court's dismissal of the action against Kallestead.

AFFIRMED.

APPENDIX C

On February 27, 1990, the following was filed in the Iowa District Court for Clinton County.

IN THE IOWA DISTRICT COURT FOR
CLINTON COUNTY

CASE NO. CL13758

MARY LYNN MEYERS; DONALD F. MEYERS; Executor of Estate of Geraldine E. Meyers,

Plaintiffs,

vs.

JAMES WALTON HALL, ROBERT D. HALL, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN,

Defendants.

PETITION AT LAW

Division I

Plaintiff Mary Lynn Meyers for cause of action against Defendants James Walton Hall and Robert D. Hall states:

1. On or about December 16, 1989 Plaintiff was driving a 1983 AMC automobile proceeding northerly on U.S. Highway 67 in Clinton County, Iowa.

2. Defendant James Walton Hall was then driving a 1977 Chevrolet Blazer truck over said road, approaching Plaintiff, and drove his vehicle into Plaintiff's automobile.

3. Defendant was negligent in operating his vehicle in the following respects:

A. In failing to keep a proper lookout;

B. In failing to have his vehicle under control;

C. In failing to yield half of the traveled road by turning to his right when meeting Plaintiff's automobile;

D. In not giving any warning that he would fail to drive his vehicle on his right side of the road, in time to enable Plaintiff to provide for such failure;

E. In operating his motor vehicle while intoxicated in violation of

Chapter 321J, Code of Iowa.

4. Defendant's said negligence was a proximate cause of the damages described below.

5. At all times material hereto, said motor vehicle was being driven by the Defendant James Walton Hall with the knowledge and consent of Defendant Robert D. Hall, who was the owner of said vehicle.

6. Plaintiff has been damaged in the following respects and particulars:

A. She received severe and permanent personal injuries;

B. She endured and will continue to endure great pain, suffering, mental anguish, physical disability and inconvenience;

C. She has been and will continue to be precluded or handicapped from performing her ordinary work and has lost and will continue to lose income or earnings from such work;

D. She has incurred and will continue to incur medical, hospital and nursing expenses.

7. By reason of said personal injuries Plaintiff is entitled to damages in an amount in excess of the jurisdictional limits of small claims court.

8. The conduct of Defendant James Walton Hall was wilfull, malicious, reckless and wanton, and justifies an award of punitive damages.

WHEREFORE Plaintiff prays for judgment against Defendants James Walton Hall and Robert D. Hall in such amount as will reasonably compensate her for her damages, injuries and losses, for an award of punitive damages against Defendant James Walton Hall and for the costs of this action.

Division II

Plaintiff Donald F. Meyers, Executor, for cause of action against James Walton

Hall and Robert D. Hall states:

1. Plaintiff Donald F. Meyers is the duly appointed, qualified and acting Executor of the Estate of Geraldine E. Meyers, pursuant to an Order entered and Letters of Administration issued by the Iowa District Court for Jackson County, Iowa, on December 28, 1989 in Case Number P-16169.

2. Plaintiff brings this action as Executor pursuant to and as authorized by Iowa Code Section 613.15, 611.20 and 611.22 as decedent's legal representative and successor in interest and on behalf of and for the benefit of Donald F. Meyers, Judith A. Bowling, Mary L. Meyers and David R. Meyers, children of the decedent.

3. On or about December 16, 1989, Plaintiff's decedent, Geraldine E. Meyers was riding as a passenger in a 1983 AMC automobile proceeding northerly on U.S. Highway 67 in Clinton County, Iowa.

4. Defendant James Walton Hall was

then driving a 1977 Chevrolet Blazer over said road, approaching Plaintiff's decedent, and drove his vehicle into the automobile in which decedent was riding.

5. Defendant James Walton Hall was negligent in operating his vehicle in the following respects:

A. In failing to keep a proper lookout;

B. In failing to have his vehicle under control;

C. In failing to yield half of the traveled road by turning to his right when meeting Plaintiff's automobile;

D. In not giving any warning that he would fail to drive his vehicle on his right side of the road, in time to enable Plaintiff to provide for such failure;

E. In operating his motor vehicle while intoxicated in violation of Chapter 321J, Code of Iowa.

6. Defendant's said negligence was a

proximate cause of the damages described below which exceed the jurisdiction of small claims court.

7. At all times material hereto, said motor vehicle was being driven by the Defendant James Walton Hall with the knowledge and consent of Defendant Robert D. Hall, who was the owner of said vehicle.

8. As a result of one or more of the foregoing negligent acts or omissions by Defendant, decedent Geraldine E. Meyers suffered severe multiple injuries which caused her death on December 16, 1989.

9. By reason of the wrongful death of the decedent, the adult children of the decedent, Donald F. Meyers, Judith A. Bowling, Mary L. Meyers and David R. Meyers, have sustained injury in that they have been deprived of the society, companionship, guidance, advice, love and affection of the deceased. They have also

been deprived of other sums of money and valuable services which decedent was accustomed to contribute to them from time to time and would have continued to contribute, but for her death, all to their damage.

10. As a further result of the negligence of Defendant, decedent suffered great physical and mental pain, suffering and agony from the time of impact until her death.

11. As a further result of Defendant's negligence decedent's estate has been reduced in value and has incurred substantial expenses for medical and hospital care and premature funeral expenses.

12. The conduct of Defendant James Walton Hall was wilful, reckless and wanton and justifies an award of punitive damages.

WHEREFORE Plaintiff prays for judgment against the Defendants James Walton Hall and Robert D. Hall, jointly

and severally for such amounts as will adequately and fairly compensate Decedent's Estate and those other injured parties represented by Plaintiff for damages sustained, for punitive damages against Defendant James Walton Hall and, for the costs of this action.

Division III

Plaintiff Mary Lynn Meyers for cause of action against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern states:

1. Defendant Betty Kallestead, d/b/a Bette Mom's Tavern, owns and operates a business where alcoholic beverages are sold located at 24 Pike Street in Savanna, Illinois.

2. Said Defendant holds a license and permit to sell beer, wine, or intoxicating liquor.

3. On or about December 16, 1989 Defendant, or her agent or employees, sold and served Defendant James Walton Hall

beer, wine, or intoxicating liquors to a point where Defendant, her agent or employees knew or should have known James Walton Hall would become intoxicated, or when the said James Walton Hall was intoxicated at the time of such sale and service.

4. The beer, wine or intoxicating liquors sold and served by Defendant, her agent or employees to the said James Walton Hall was a proximate cause of his intoxication.

5. On or about December 16, 1989 the said James Walton Hall while in an intoxicated condition drove a 1977 Chevrolet Blazer truck into a 1983 AMC automobile being driven by Plaintiff on U.S. Highway 67 in Clinton County, Iowa.

6. As a direct and proximate result of the collision aforesaid Plaintiff Mary Lynn Meyers was injured in person and property in the following respects and particulars:

A. She received severe and permanent personal injuries;

B. She endured and will continue to endure great pain, suffering, mental anguish, physical disability and inconvenience;

C. She has been and will continue to be precluded or handicapped from performing her ordinary work and has lost and will continue to lose income or earnings from such work;

D. She has incurred and will continue to incur medical, hospital and nursing expenses;

E. She suffered loss and destruction of personal property and effects.

7. By reason of said injuries to her person and property, Plaintiff is entitled to damages in an amount in excess of the jurisdictional limits of small claims court.

WHEREFORE Plaintiff prays for judgment against Defendant Bette Kallestead, d/b/a Bette Mom's Tavern in such amount as will reasonably compensate her for her damages, injuries and losses and for the costs of this action.

Division IV

Plaintiff Donald F. Meyers, Executor of the Estate of Geraldine E. Meyers, for cause of action against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern states:

1-4. Plaintiff realleges and incorporates by this reference paragraphs 1 through 4 inclusive of Division III of this Petition.

5-7. Plaintiff realleges and incorporates by reference paragraphs 1 through 3 inclusive of Division II of this Petition.

8. Defendant James Walton Hall, in an intoxicated condition, was then driving

a 1977 Chevrolet Blazer over said road, approaching Plaintiff, and drove his vehicle into the automobile in which decedent was riding.

9. The collision between the vehicle driven by Defendant James Walton Hall and the vehicle in which Plaintiff's decedent was riding was a proximate cause of the damages described below which exceed the jurisdiction of small claims court.

10. As a result of the aforesaid collision, decedent Geraldine E. Meyers suffered severe multiple injuries which caused her death on December 16, 1989.

11. By reason of the wrongful death of the decedent, the adult children of the decedent, Donald F. Meyers, Judith A. Bowling, Mary L. Meyers and David R. Meyers, have sustained injury to property and means of support in that they have been deprived of the society, companionship, advice, love and affection of the deceased. They have also been deprived of

sums of money and valuable services which decedent was accustomed to contribute to them from time to time and would have continued to contribute, but for her death, all to their damage.

12. As a further result of the aforesaid collision Plaintiff's decedent suffered personal injury, great physical and mental pain, suffering and agony from the time of impact until her death.

13. As a further result of the aforesaid collision decedent's estate has been reduced in value and has incurred substantial expenses for medical and hospital care and premature funeral expenses.

WHEREFORE Plaintiff prays for judgment against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern for such amounts as will adequately and fairly compensate Plaintiff for damages sustained by decedent's estate and the other injured par-

ties represented by Plaintiff and for the costs of this action.

Division V

Plaintiff Mary Lynn Meyers for cause of action against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern states:

1. Defendant Betty Kallestead owns and operates a business known as Bette Mom's Tavern located at 24 Pike Street in Savanna, Illinois.

2. On or about December 16, 1989 Defendant, her agents or employees negligently sold beer, wine or intoxicating liquors to James Walton Hall who was then intoxicated, said sale being in violation of Illinois Revised Statutes Chapter 43 Section 131 and contrary to Iowa Code Section 123.49.

3. At the time of said negligent and unlawful sale Defendant, her agents or employees knew, or in the exercise of reasonable care should have known and foreseen that James Walton Hall would

operate a motor vehicle in an intoxicated condition, thereby endangering others lawfully using the public roads.

4. The beer, wine or intoxicating liquor sold by Defendant, her agents or employees to the said James Walton Hall was a proximate cause of his intoxication.

5. Thereafter, and while in a continuous state of intoxication James Walton Hall drove a 1975 Chevrolet Blazer truck into a 1983 AMC automobile being driven by Plaintiff on U.S. Highway 67 in Clinton County, Iowa.

6. The aforesaid collision was the result of Defendant's negligence in selling beer, wine or intoxicating liquor to an intoxicated person.

7. Defendant's said negligence was a proximate cause of the damages described below.

8-9. Plaintiff repleads and incorporates by reference paragraphs 6 and

7 of Division I of this Petition.

WHEREFORE Plaintiff prays for judgment against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern in such amount as will reasonably compensate her for her damages, injuries, and losses, and for the costs of this action.

Division VI

Plaintiff Donald F. Meyers, Executor of the Estate of Geraldine E. Meyers, for cause of action against Defendant Betty Kallestead states:

1-2. Plaintiff realleges and incorporates by reference paragraphs 1 and 2 of Division II of this Petition.

3-6. Plaintiff realleges and incorporates by reference paragraphs 1 through 4 inclusive of Division V of this Petition.

7. Defendant James Walton Hall, while in a continuous state of intoxication thereafter drove a 1977 Chevrolet Blazer into the 1983 AMC automobile in

which Plaintiff's decedent was riding on U.S. Highway 67 in Clinton County, Iowa.

8. The aforesaid collision was the result of Defendant's negligence in selling beer, wine or intoxicating liquor to an intoxicated person.

9. The negligence of Defendant Kallestead, her agents or employees was a proximate cause of the damages described below which exceed the jurisdiction of small claims court.

10. As a result of the foregoing negligent acts by Defendant Kallestead, her agents or employees, decedent Geraldine E. Meyers suffered severe multiple injuries which caused her death on December 16, 1989.

11-13. Plaintiff realleges and incorporates by reference paragraphs 9 through 11 of Division II of this Petition.

WHEREFORE Plaintiff prays for judg-

ment against Defendant Betty Kallestead, d/b/a Bette Mom's Tavern for such amounts as will adequately and fairly compensate decedent's estate and those other injured parties represented by Plaintiff for damages sustained and for the costs of this action.

(Duly signed)

* * * * * *

APPENDIX D

On April 23, 1990, the following was filed:

IN THE IOWA DISTRICT COURT FOR
CLINTON COUNTY

CASE NO. CL13758

MARY LYNN MEYERS; DONALD F. MEYERS; Executor of Estate of Geraldine E. Meyers,

Plaintiffs,

vs.

JAMES WALTON HALL, ROBERT D. HALL, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN,

Defendants.

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON AND FAILURE TO STATE A CLAIM IN WHICH ANY RELIEF CAN BE GRANTED

NOW COMES the Defendant, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN, and hereby respectfully requests that this court dismiss with prejudice Divisions III, IV, V and VI of the Plaintiff's Petition in the above entitled action, for the following reasons:

DIVISION I

Pursuant to Iowa Rules of Civil Procedure 66 and Iowa Rules of Civil Procedure 104(a), this Defendant hereby asserts that this court lacks personal jurisdiction over the person in that she lacks the minimum contacts with the State of Iowa as provided for in Iowa Rule 56.2 to subject her to the jurisdction of this court. See Defendant Betty Kallestead's Affidavit attached hereto and marked as Exhibit "A".

WHEREFORE, Defendant, Betty Kallestead, respectfully requests that Division III, IV, V and VI of the Plaintiffs' petition be dismissed with prejudice for lack of personal jurisdiction over the person of this Defendant.

DIVISION II

The Defendant, Betty Kallestead, by and through her attorneys, Klockau, McCarthy, Ellison & Marquis, P.C., respectfully request that Division V and VI

of the Plaintiffs' Petition be dismissed for failure to state a claim upon which relief may be granted, and in support of said Motion, states:

1. That Divisions V and VI of the Plaintiffs' Petition attempts to plead common law cause of action against this Defendant for selling beer, wine or intoxicated liquors to James Walton Hall, the alleged intoxicated person, based upon the alleged violation of certain Illinois or Iowa statutes.

2. That paragraph 2 of Division III of the Plaintiffs' petition alleges that this Defendant holds a licence or permit to sale beer, wine, or intoxicating liquors.

3. That in examining the allegations of the Divisions V and VI in the light most favorable to the Plaintiff, it is clear that Divisions V and VI fail to state a claim upon which relief may be granted in that the law in Iowa is clear

and unequivocal that no common law cause of action can be pursued against a licensee or permitee. See Fuhrman vs. Total Petroleum Inc., 389 N.W.2d, 807 (Iowa 1987, and Connolly vs. Conlan, 371 N.W.2d 832 (Iowa 1985).

WHEREFORE, this Defendant respectully requests that Division V and VI of the Plaintiffs' Petition be dismissed with prejudice, with costs assessed to the Plaintiffs.

DEFENDANT RESPECTFULLY REQUEST A TIME CONVENIENT WITH THE COURT AND COUNSEL FOR THE PURPOSE OF ORAL ARGUMENTS ON THE FOREGOING MOTION.

(Duly signed)

* * * * * *

Exhibit "A"

AFFIDAVIT

STATE OF IOWA]
] ss:
CLINTON COUNTY]

I, BETTY KALLESTEAD, after having

been duly sworn and upon my oath, state unto the court as follows:

1. My name is Betty Kallestead and I reside at 24 Pike Road, Savanna, Illinois 61074.

2. I personally operate a business known as Bette Mom's as a sole proprietorship located at 24 Pike Road, Savanna, Illinois 61074.

3. As owner of Bette Mom's, I hold a liquor license issued by the City of Savanna, Illinois, and State of Illinois.

4. I do not hold any liquor license or permit issued by any Iowa governmental body, including the Iowa Liquor Control Commission.

5. I do not advertise in any Iowa newspaper or other media, and do not advertise in any media whatsoever that is circulated or broadcast in the state of Iowa.

6. I do not own or operate any business in the state of Iowa.

FURTHER AFFIANT SAYETH NAUGHT.

(Duly signed)

* * * * * *

APPENDIX E

On April 18, 1990, the following was filed:

IN THE IOWA DISTRICT COURT FOR
CLINTON COUNTY

CASE NO. CL13758

MARY LYNN MEYERS; DONALD F. MEYERS; Executor of Estate of Geraldine E. Meyers,

Plaintiffs,

vs.

JAMES WALTON HALL, ROBERT D. HALL, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN,

Defendants.

RESISTANCE TO MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Plaintiffs resist the Motion of Defendant Betty Kallestead to dismiss for lack of jurisdiction over the person and failure to state a claim upon which any relief can be granted and as grounds for the resistance state:

DIVISION I

1. The allegations of Plaintiff's

Petition and Defendant's Affidavit establish that Defendant was a substantial contributing factor in an injury occurring in the State of Iowa.

2. The Illinois dram shop statute, Chapter 43, Section 135, covers injuries occurring only within the State of Illinois and applies both to Illinois permit holders and out of state permit holders. Thus Illinois, the state of Defendants' residence, would exercise jurisdiction over an Iowa permit holder under similar circumstances.

3. Section 123.92, Code of Iowa, establishes by statute a right of action against any licensee or permittee selling and serving intoxicating liquors under the conditions prescribed in the statute.

4. Defendant in her Affidavit admits she is the holder of a liquor license.

5. Defendant has sufficient minimum contacts with the state of Iowa to vest

this Court with personal jusidiction.

WHEREFORE, Plaintiffs pray for dismissal of Division I of Defendant's Motion at Defendant's cost.

DIVISION II

1. Defendant in her Affidavit admits to holding an Illinois liquor license and denies holding an Iowa liquor license.

2. If Defendant, as holder of an Illinois liquor license, is a licensee or permittee under Section 123.92, Code of Iowa, (dram shop act), then Plaintiffs admit there is no common law case of action against her.

3. If, on the other hand, the holder of an Illinois liquor license is not a licensee or permittee under Section 123.92, Code of Iowa, then a common law cause of action does lie. Bauer v. Dann, 428 N.W. 2d 658 (Iowa 1988).

4. If Defendant is a licensee or permittee under Section 123.92, Code of Iowa, then Plaintiffs agree the common law

causes of action should be dismissed. This issue is a matter of law which must be resolved before the common law claims are subject to dismissal for failure to state a claim upon which relief can be granted.

WHEREFORE, Plaintiff requests entry of an Order adjudicating the status of Defendant as a licensee or permittee within the provisions of Section 123.92, Code of Iowa, and granting the relief requested by Defendants with regard to Divisions V and VI of Plaintiff's Petition or, alternatively, an Order holding Defendant is not a permittee or licensee under Section 123.92 of the Code and denying the relief requested in Division II of Defendant's Motion.

(Duly signed)

* * * * * *

REQUEST TO BE HEARD IN ORAL ARGUMENT

Plaintiffs request to be heard in

oral argument upon Defendant's Motion and this Resistance.

APPENDIX F

On April 18, 1990, the following was filed:

IN THE IOWA DISTRICT COURT FOR
CLINTON COUNTY

CASE NO. CL13758

MARY LYNN MEYERS; DONALD F. MEYERS; Executor of Estate of Geraldine E. Meyers,

Plaintiffs,

vs.

JAMES WALTON HALL, ROBERT D. HALL, BETTY KALLESTEAD, d/b/a BETTE MOM'S TAVERN,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESISTANCE TO DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION AND FAILURE TO STATE A CLAIM

DIVISION I

Jurisdiction. Defendant claims she is not subject to the personal jurisdiction of the Iowa Court. Rule 66, Iowa Rules of Civil Procedure, was amended in 1987 to abolish the special appearance and authorizes the challenge to jurisdiction

by pre-answer Motion. Under the former Rule providing for special appearance to challenge personal jurisdiction, the allegations of the Petition were accepted as true. Martin v. Ju-Li Corp., 332 N.W. 2d 871 (Iowa 1983). There appears to be no authority changing the assumption since Rule 66 was amended. The underlying policy reasons supporting the assumption would appear to remain applicable.

A two prong test applies when considering jurisdiction over non-residents. First, does the statute authorize assumption of jurisdiction of the Defendant and, second, would assumption of jurisdiction offend constitutional due process of law? Martin v. Ju-Li Corp., supra, at 874. The first prong of the test seems to be satisfied by both the Iowa long arm statute, Section 617.3 of the Code which provides for jurisdiction over persons who commit torts in whole or in part in Iowa. Addi-

tionally, the Iowa dram shop act, Section 123.92 provides for a claim on the part of injured parties against any licensee or permittee selling and serving alcoholic beverages under circumstances alleged in the Petition.

A five part test applies in determining constitutionality. These are: (1) quantity of the contacts; (2) nature and quality of the contacts; (3) source and connection of cause of action within those contacts; (4) interest of forum state; and (5) convenience. Of these five, the first three are the most important. Berkley Intern. Co., Ltd. v. DeVine, 289 N.W. 2d 600 (Iowa 1980). In the instant case, Defendant operates a tavern in Savanna, Illinois. The Court can take judicial notice of the fact that Savanna is located on the Mississippi River and connected to Iowa by a bridge crossing the Mississippi. Clearly she should anticipate that patrons of her establishment might travel into

Iowa. In this case, the injury also occurred in Iowa. It has been held where injury occurs to Plaintiffs in Iowa and the Defendant should reasonably believe his conduct would produce damage in Iowa, Iowa has a strong interest in hearing the case and protecting its' residents. Universal Cooperatives, Inc. v. Tasco, Inc., 300 N.W. 2d 139 (Iowa 1981).

The case at bar is akin to the case of a non-resident defendant who installed a trailer hitch outside the state of Iowa which hitch allegedly precipitated an Iowa accident. The Court held putting the allegedly defective trailer hitch into the stream of commerce was sufficient to give the Iowa Court jurisdiction even though the defendant's only contact with Iowa was the accident itself. Edmundson v. Miley Trailer Co., 211 N.W. 2d 269 (Iowa 1973). In the instant case, Defendant put an intoxicated driver into the stream of

commerce who caused an accident in Iowa. She is therefore subject to the in personam jurisdiction of Iowa Courts.

Defendant's home state of Illinois provides by statute for jurisdiction in Illinois Courts over out of state liquor license holders who sell intoxicants to persons subsequently causing injury in the state of Illinois. 43 Ill. Rev. Stat. Section 135 (copy attached as Exhibit 1).

In the instant case, if the Iowa Courts do not have personal jurisdiction over the Defendant, then Plaintiffs appear to have no dram shop act claim against the Defendant. This is true because the Illinois dram shop act applies only to injuries occurring within the state of Illinois. Ill. Rev. Stat. Chapter 43 Section 135; Linnabery v. Depaw, 695 N.W. 2d 411 (C.D. Ill. 1988). Unlike Illinois, the Iowa dram shop act has been construed to apply extra territorially and provided a remedy to a Minnesota resident who sus-

tained injury while involved in a Minnesota automobile accident with an intoxicated driver receiving intoxicating liquor from an Iowa licensee. Bankord v. Derock, 423 F. Supp. 602 (D.C. 1976). It would be cruel irony if Iowa law were to provide a remedy to a Minnesota resident injured in a Minnesota accident by a person sold intoxicating liquors in Iowa by an Iowa license holder and yet deny a forum to an Iowa resident injured in Iowa by an intoxicated person procurring alcoholic beverages from an Illinois licensee. This would be an especially harsh result in view of the Illinois statute denying relief for injuries occurring outside Illinois. The Defendant had sufficient minimum contacts with Iowa to support personal jurisdiction and her Motion to Dismiss for want of personal jurisdiction should be overruled.

DIVISION II

Common Law Claims. Defendant seeks dismissal of Plaintiff's common law causes of action on the grounds the common law claims are preempted by the Iowa dram shop act, Section 123.92, Code of Iowa. If Defendant is a licensee or permittee under Section 123.92, then Defendant is correct. Plaintiffs have indeed alleged Defendant is a licensee or permittee within the provisions of Section 123.92, Code of Iowa. Defendant's Affidavit admits she holds an Illinois license and denies she holds an Iowa license. The issue is thus squarely presented, is an Illinois licensee a licensee or permittee under Section 123.92, Code of Iowa? Uniform Jury Instruction 1300.1 requires the jury to find the defendant was licensed by the State of Iowa to sell beer, wine or liquor. The authorities cited do not support this conclusion. "Permit" or "license" is defined in Section 123.3(4), Code of Iowa, as "an express written

authorization issued by the division for the manufacture or sale, or both, of alcoholic liquor, wine or beer." The "division" is defined in Section 123.3(2) as the alcoholic beverages division at the Department of Commerce. The term "licensee or permittee" is not defined as such.

Where, as in this case, injury has occurred in Iowa to Iowa residents, there are sound policy reasons justifying the inclusion of non-resident licensees or permittees under the Iowa dram shop act. Iowa has a strong interest in protecting its residents from the wrongful acts of intoxicated persons served alcoholic beverages at taverns in adjoining states. This is particularly true where the adjoining state is Illinois, which closes its Courts to persons injured by its retailers of alcoholic beverages where the injury occurs outside Illinois borders.

In this context, the word "any" is significant in determining the application of the Iowa dram shop act which provides for an action for "any" licensee or permitee. The use of the word "any" is an all encompassing term. It is not limited to any Iowa licensee or permittee and should not be so construed. The inclusion of non-resident licensees and permittees within the coverage of the Iowa Dram Shop Act just makes good common sense. What justification is there for an Iowa Court to interpret the Iowa dram shop act in a manner which would allow operators of taverns upon the borders of adjoining states to launch intoxicated drivers into Iowa without any means for injured Iowa residents to hold such tavern owners accountable for their irresponsible actions?

If the Court determines Defendant is not a licensee or permittee within the meaning of the Iowa Dram Shop Act, then

Defendant's Motion to Dismiss for Failure to State a Claim should be overruled. Iowa does recognize a common law cause of action where alcoholic beverages are given or supplied negligently. One measure of negligence in Iowa is whether the alcoholic beverages were given or supplied in violation of a statute. In one case, social hosts supplied alcoholic beverages to a minor. Bauer v. Dann, 428 N.W. 2d 658 (Iowa 1988).

The Iowa Supreme Court has recently upheld a common law cause of action against an employee of a state liquor store who sold alcoholic beverages to an intoxicated person in violation of Section 123.49(1), Code of Iowa. The Iowa Court went on to hold that the exemptions from civil liability of Section 123.49 apply only to persons who give or dispense alcoholic beverages, but not to those who sell them. Thorp v. Casey's General

Stores, Inc., 446 N.W. 2d 457 (Iowa 1989). Thus, if Defendant is not a licensee or permittee under the dram shop action, she is still subject to claims at common law for negligent sale of alcoholic beverages to an intoxicated person who causes injury in Iowa.

Plaintiffs have admittedly pled inconsistent theories in the alternative against the Defendant. At some point in these proceedings, the Court must decide the legal issue of whether an Illinois licensee is a licensee or permittee under the Iowa Dram Shop Act. There appears to be no Appellate Court authority on this question. It also appears the Defendant's Motion places the issue squarely before the Court at this time. In order to grant Defendant's Motion, the Court must find as a matter of law that Defendant is a licensee or permitee under the Iowa Dram Shop Act, otherwise, the common law causes of action are well pled under present Iowa

law.

It should be observed that under the common law theory, it is not necessary to show sale and service nor is it necessary to show the seller knew or should have known the person was intoxicated as is required under the Dram Shop Act. Given this different standard of proof, it might be argued a non-resident permit holder is held to a different standard than resident permit holders which amounts to an unconstitutional denial of equal protection of the laws. This is another justification for interpreting the Iowa Dram Shop Statute to apply to non-resident as well as resident licensees and permittes.

(Duly signed)

* * * * * *

EXHIBIT 1

135. Actions for damages caused by intoxication-Lessor's liability-Forfeiture of lease-Maximum recovery-Limitations-

Jurisdiction-Service.

Sec. 6-21. (a) Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person, licensed under the laws of this State cr of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person. Any person at least 21 years of age who pays for a hotel or motel room or facility knowing that the room or facility is to be used by any person under 21 years of age for the unlawful consumption of alcoholic liquors and such consumption causes the intoxication of the person under 21 years of age, shall be liable to any person who is injured in person or property by the intoxicated person under 21 years of age. Any person owning, renting, leasing or

permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable, severally or jointly, with the person selling or giving the liquors. However, if such building or premises belong to a minor or other person under guardianship the guardian of such person shall be held liable instead of the ward. A married woman has the same right to bring the action and to control it and the amount recovered as an unmarried woman. All damages recovered by a minor under this Act shall be paid either to the minor, or to his or her parent, guardian or next friend as the court shall direct. The unlawful sale or gift of alcoholic liquor works a forfeiture of all rights of

the lessee or tenant under any lease or contract of rent upon the premises where the unlawful sale or gift takes place. All actions for damages under this Act may be by any appropriate action in the circuit court. An action shall lie for injuries to means of support caused by an intoxicated person or in consequence of the intoxication of any person resulting as hereinabove set out. The action, if the person from whom support was furnished is living, shall be brought by any person injured in means of support in his or her name for his or her benefit and the benefit of all other persons injured in means of support. However, any person claiming to be injured in means of support and not included in any action brought hereunder may join by motion made within the times herein provided for bringing such action or the personal representative of the deceased person from whom such support was furnished may so join. In

every such action the jury shall determine the amount of damages to be recovered without regard to and with no special instructions as to the dollar limits on recovery imposed by this Section. The amount recovered in every such action is for the exclusive benefit of the person injured in loss of support and shall be distributed to such persons in the proportions determined by the verdict rendered or judgment entered in the action. If the right of action is settled by agreement with the personal representative of a deceased person from whom support was furnished, the court having jurisdiction of the estate of the deceased person shall distribute the amount of the settlement to the person injured in loss of support in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the

percentages of dependency of all such persons upon the deceased person. For all causes of action involving persons injured, killed, or incurring property damages before September 12, 1985, in no event shall the judgment or recovery under this Act for injury to the person or to the property of any person as hereinabove set out exceed $15,000, and recovery under this Act for loss of means of support resulting from the death or injury of any person, as hereinabove set out, shall not exceed $20,000. For all cuases of action involving persons injured, killed, or incurring property damage after September 12, 1985, in no event shall the judgment or recovery for injury to the person or property of any person exceed $30,000 for each person incurring damages, and recovery under this Act for loss of means of support resulting from the death or injury of any person shall not exceed $40,000. Nothing in this Section bars any

person from making separate claims which, in the aggregate, exceed any one limit where such person incurs more than one type of compensable damage, including personal injury, property damage, and loss to means of support. However, all persons claiming loss to means of support shall be limited to an aggregate recovery not to exceed the single limitation set forth herein for the death or injury of each person from whom support is claimed.

Nothing in this Act shall be construed to confer a cause of action for injuries to the person or property of the intoxicated person himself, nor shall anything in this Act be construed to confer a cause of action for loss of means of support on the intoxicated person himself or on any person claiming to be supported by such intoxicated person. In conformance with the rule of statutory construction enunciated in the general

Illinois saving provision in Section 4 of "An Act to revise the law in relation to the construction of the statutes", approved March 5, 1874, as amended,[1] no amendment of this Section purporting to abolish or having the effect of abolishing a cause of action shall be applied to invalidate a cause of action accruing before its effective date, irrespective of whether the amendment was passed before or after the effective date of this amendatory Act of 1986.

Each action hereunder shall be barred unless commenced within one year next after the cause of action accrued.

However, a licensed distributor or brewer whose only connection with the furnishing of alcoholic liquor which is alleged to have caused intoxication was the furnishing or maintaining of any apparatus for the dispensing or cooling of

---

[1]Chapter 1, Paragraph 1103.

beer is not liable under this Section, and if such licensee is named as a defendant, a proper motion to dismiss shall be granted.

(b) Any person licensed under any state or local law to sell alcoholic liquor, whether or not a citizen or resident of this State, who in person or through an agent causes the intoxication, by the sale or gift of alcoholic liquor, of any person who, while intoxicated, causes injury to any person or property in the State of Illinois thereby submits such licensed person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State for a cause of action arising under subsection (a) above.

Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this subsection, may be made by personally

serving the summon upon the defendant outside this State, as provided in the Code of Civil Procedure, as now or hereafter amended,[2] with the same force and effect as though summons had been personally served within this State.

Only causes of action arising under subsection (a) above may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this subsection.

Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Amended by P.A. 84-1488, Art. II, Sec. 26, eff. Dec. 22, 1986.

[2]Chapter 110, Paragraph 1-101 et seq.

APPENDIX G

MOTION TO DISMISS

On January 2, 1992 the following document was served upon Petitioners:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

CASE NO. 91 C 20362

MARY LYNN MEYERS and DONALD F. MEYERS, as Executor of the Estate of Geraldine E. Meyers, deceased,

Plaintiffs,

vs.

BETTE L. KALLESTEAD aka Betty L. Kallestead, individually and dba Bette Mom's Tavern,

Defendant.

COMES NOW defendant, Bette L. Kallestead, a/k/a Betty L. Kallestead, individually, and d/b/a Bette Mom's Tavern, by her attorneys, Klockau, McCarthy, Ellison & Marquis, P.C., and pursuant to Rule 12 of the Federal Rules of Civil Procedure, moves to dismiss the complaint of plaintiff in the entitled cause and as reason therefore states as follows:

COUNTS I AND II

1. Neither Count I nor Count II states a claim upon which relief may be granted.

2. Each of the said counts purport to be based on the Iowa Dram Shop Act (Iowa Code Sec. 123.92). The Iowa Dram Shop Act only provides a remedy against a "licensee or permittee". Sec. 123.3(4) of the Iowa Code defines permit or licensee as "an express written authorization issued by the division." The Iowa Code Sec. 123.3(2) defines "division" as the alcoholic beverage division at the Department of Commerce of the State of Iowa.

3. The defendant, Bette L. Kallestead, a/k/a Betty L. Kallestead, individually and d/b/a Bette Mom's Tavern, is not a licensee or permittee within the meaning of the Iowa Dram Shop Act.

4. In support of this motion, the Affidavit of defendant, Bette L. Kallestead is attached hereto as Exhibit "A".

COUNTS III AND IV

1. Counts III and IV of plaintiff's complaint fail to state a claim upon which relief may be granted.

2. Each of these counts purports to state a common law claim against the defendant for the negligent sale of beer, wine or intoxicating liquors. Said negligent conduct is alleged to have arisen out of violations of Ill. Rev. Stat. Ch. 43, Sec. 131, which prohibits the sale of liquor to persons under a disability and Iowa Code Sec. 123.49, which contains similar prohibitions.

3. The common law of Iowa cannot be applied to the claim of plaintiff for the reason that insufficient contact with Iowa interests exists as a matter of law. The Supreme Court of Iowa, the highest reviewing court in that State, ruled in an opinion filed on October 16, 1991, in a case arising out of the identical circumstances pleaded in the case at bar, that the defendant, Betty Kallestead,

lacked sufficient minimum contacts with the State of Iowa, to confer personal jurisdiction upon the State Courts of Iowa. A true copy of the Supreme Court opinion is attached hereto and made a part hereof as Exhibit "B". It follows that if insufficient contact has been established to create personal jurisdiction, that insufficient contact has been established to require the common law of Iowa as the choice of law in this forum. Therefore, the Iowa common law does not provide a remedy against this defendant.

* * * * * *

Exhibit "A"

Affidavit

STATE OF IOWA]
] ss:
COUNTY OF CLINTON]

I, BETTY KALLESTEAD, after having been duly sworn and upon my oath, state unto the court as follows:

1. My name is Betty Kallestead and I reside at 24 Pike Road, Savanna, Illinois 61074.

2. I personally operate a business known as Bette Mom's as a sole proprietorship located at 24 Pike Road, Savanna, Illinois 61074.

3. As owner of Bette Mom's, I hold a liquor license issued by the City of Savanna, Illinois, and State of Illinois.

4. I do not hold any liquor license or permit issued by any Iowa governmental body, including the Iowa Liquor Control Commission.

5. I do not advertise in any Iowa newspaper or other media, and do not advertise in any media whatsoever that is circulated or broadcast in the state of Iowa.

6. I do not own or operate any business in the State of Iowa.

FURTHER AFFIANT SAYETH NAUGHT.

(Duly signed)

* * * * * *